IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OR LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellant, vs. HAROLD S. ANDERSON, JR., et al Appellees.	No. 14327 SUPPLEMENTAL BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Pursuant to the Order of this Court dated December 11, 1955, we are filing this Supplemental Brief directed to the three points referred to in that Order.

I

THE EFFECT OF THE 1949 AMENDMENT TO SECTION 3(j) OF THE FAIR LABOR STANDARDS ACT, AS AMENDED, UPON THE PRINCIPLE ANNOUNCED IN CONSOLIDATED TIMBER CO. vs. WOMACK (1942) 132 F. 2d 101

We believe that a consideration of the 1949 amendment to Section 3(j) (29 U.S.C.A., Sec. 203(j)) and the history which led to that amendment requires the conclusion that the principle of the Womack decision has been substantially qualified as applied to the facts in this case. The intent of Congress in amending that section is unusually clear. Illustrative of the intent is the history of the case of McComb v. Factory Stores Co., 81 F. Supp. 403 decided under Section 3(j) prior to its amendment when "necessary" rather than "closely related and directly essential" was the test.

The factual similarities between the Factory Stores Co. case and the instant case are striking:

1) As here, it involved an action by the Department of Labor for an injunction. The defendant operated facilities very similar to those involved here for the Republic Steel Corporation and for other companies.

The facility was located in the Republic Steel plant and provided eating facilities for production workers (81 F. Supp. 403, 405).

2) The facilities were operated under a written agreement very similar to that involved in the instant case. The agreement contained most of the items considered significant by this Court on Page 2 of its Opinion (81 F. Supp. 403-4).

3) The employees were not even permitted to leave the plant and were therefore required to eat at the facility unless they saw fit to bring their own lunch or utilized a few lunch wagons (81 F. Supp. 405).

4) Even if the employees could have left the plant "The location of the plant. . . makes it impractical for the men to eat at outside restaurants" and "it would be difficult if not impossible with the available transportation facilities" for them to do so (81 F. Supp. 405).

5) The issue involved was whether the Act covered persons employed by an industrial eating facility similar to that involved in the instant case.

There is therefore in the factual situation of the Factory Stores Co. case every significant element relied upon by the majority opinion in the instant case. The "isolation", to the extent that that concept is relevant here, was more complete than is true in the

instant case. The necessity that the employees utilize the eating facilities was a chief factor upon which the decision in that case was based. The employees there had to use the defendant's facilities not only because of location and the lack of available transportation, but also because of plant regulations.

The trial court in the Factory Stores Co. case held that under such circumstances the feeding of employees was necessary to the production of goods for commerce. While this case was pending on appeal before the Sixth Circuit Court of Appeals, it was brought under criticism in Congress and was the subject of much comment there. The decision was in effect repealed by the 1949 amendment. The legislative history of the amendment clearly shows an intent to specifically reverse the decision of the trial court. This result was recognized by the Sixth Circuit Court of Appeals which remanded it to the Federal District Court where it was dismissed.

McComb v. Factory Stores Co. (6th Cir., 1948), 81 F. Supp. 403

The criticisms and consequent expression of intent of Congress concerning the case is very clear from the following excerpts from the legislative history of the 1949 amendment to Section 3(j). In establishing

gress rejected the "necessary" test and the manner in which it had been interpreted. The House Manager's Statement on the bill resulting from the Senate-House Conference and later enacted into law by signature of the President on October 26, 1949, states in part as follows:

> "Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N.D. Ohio, 1948)).
>
> "Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases. . . ."
>
> * * *
>
> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:
>
> * * *
>
> "All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."
>
> 95 Cong. Rec. 14928, 14929
>
> * * *

Mr. Lucas in his statement concerning the proposed change in Section 3(j) establishing the coverage test, said:

> "Nor could the Administrator hold the act applicable as he has in the past to the following:
>
> > "(e) Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the factory - McComb v. Factory Stores Co. (81 F. Supp. 403)."
>
> 95 Cong. Rec. 11216

Numerous other quotations appear on pp. 17 to 24 of the Reply Brief of Appellees and in the Appendix thereto.

That it was definitely the intent of Congress to change the test of coverage as it had been established under the term "necessary" in Section 3(j) of the Act, is shown by the specific rejection of an amendment which would have continued the test as it had been interpreted prior to the amendment.

> "The clerk read as follows:
>
> > "Amendment offered by Mr. Javits: On Page 4, line 21, strike out the words 'in any closely related process or occupation indispensable to the production thereof, in any State.' and insert 'or in any process or occupation necessary to the production thereof, in any State.'
>
> * * *

Mr. McConnell. The whole idea we have opposed here is the theory of bringing in certain types of people who were never intended to be brought in when this act was written. This is an effort to clarify that. Do you consider window cleaners to be in interstate commerce?

"Mr. Javits. When employees are working for a company that is engaged in interstate commerce and their work is necessary to that commerce, they should be covered by the act. Please note that I am seeking only to continue existing law by my amendment. (Emphasis added)

* * *

"All I am trying to do by my amendment is to restore the language of the act which has been thoroughly interpreted.

* * *

". . . the tellers reported there were - ayes 91, noes 133.

"So the amendment was rejected." (Emphasis added)

(95 Cong. Rec. 11216-11217.)

The amendment to Section 3(j) which was the subject matter of the foregoing legislative history accomplished the substitution of "closely related" and "directly essential" to production test for the "necessary" test. This change was one of substance and not one of mere form as the extensive legislative history concerning this amendment conclusively shows. It is abundantly clear that the framers of this legislation specifically recognized that the word "necessary" had been too broadly interpreted by the Administrator and that it was the intention of Congress through the use of the words "directly essential" and "closely related" to institute

a decidely more severe test of coverage of the Act. Mr. McConnell, one of the House Managers of the Bill, in reporting it to the House stated:

> "For instance, Congress, when it passed the act in 1938, thought that the word 'necessary', was a clear indication of intent. But, while it seems clear enough on the surface, nevertheless the Administrator and, later, the court decisions, have been expanding it beyond what was the original intent of Congress."
>
> 95 Cong. Rec. 14936.

Mr. Lucas, also a member of the House, expressed the intention of Congress, which appears throughout the legislative history, to abolish the "necessary to production" theory as developed by the Administrator and the courts.

> "As to 'indispensable' and 'directly essential', which caused some concern to many of my fellow Members, I stand for 'indispensable.' I think it is a word that will not need much litigation in order to define it, and I felt that when the House adopted such a word that it made clear its desire that the Administrator should not use the 'necessary-to-production' theory in order to go out and cover people under this act who were not originally intended to be covered by the Congress which enacted the first law. But, 'directly essential' connotes 'indispensable'. I do not mean to say that they mean the same thing, or that they do not mean the same thing, but I believe that those words will state unequivocally to the Administrator that, 'You shall not use this act to carry the coverage of the law out into the fields which are foreign to the intent of Congress'. So I believe that 'directly essential' may answer our purpose.

"I am extremely gratified that the conferees in their report used examples and cases in explaining 'directly essential', which I used in my argument during general debate on this bill, for 'indispensable'. So I think that our intent is very closely allied." *

95 Cong. Rec. 14939-14940

We urge that such a clear indication of legislative intent, together with the mere fact of the amendment to Section 3(j) itself, demonstrates that there was no congressional intent to cover the activities of Appellees here. A contrary finding would be to adopt the original decision in the Factory Stores Co. case, the very result which Congress specifically overruled in its consideration of that case.

The Court's decision in the instant case is directly contrary to this intent. Instead of recognizing the distinction which not only was, but must have been intended by a change in the wording of Section 3(j), the present decision equates "necessary" with "closely related and directly essential", making the amendment nothing more than a useless act. Indeed, the tests stated by the Court, namely one of "substantial need" and whether the facilities were needed, may be even of

* The examples and cases included the McComb v. Factory Stores Co. situation, 95 Cong. Rec. 14928-9.

lesser degree than "necessary". In any case, they do not constitute the statutory test of closely related and directly essential.

Furthermore, in applying the Womack principle rather than the test provided by Section 3(j), as amended, the Court has rejected the specific findings of fact of the trial court. The findings of fact were based upon stipulated and uncontradicted evidence. Such a result, therefore, is without justification in the law or appellate procedures. This Court in applying the Womack principle states:

> "However, in each instance the facility furnished was without a question needed, and without it the production would have been affected."
>
> (Page 4 of the Opinion)

But the findings of fact among other things state:

> "In the event that the sales and services provided by defendants at their Darwin operation should be curtailed or abandoned entirely there would be only a temporary inconvenience to the operation of the mine; the effect upon production at the mine would be unsubstantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof."
>
> (Finding of Fact No. 19 (Tr. 68-69)

In addition, such findings show, among other things, that only 20 to 25% of the employees of Anaconda

utilized Appellees' facilities at all (Tr. 55), that numerous facilities were available elsewhere which the stipulated and uncontradicted evidence shows were not only regularly used by Anaconda employees, but which were similar in distance and type to those regularly used by employees in mining areas throughout the West (Tr. 69-70), that almost one-half the number of employees using Appellees' facilities live in Lone Pine and communities away from the mine and commute regularly, that school children daily attend shcool in Lone Pine, that fifty per cent of the employees who live at Appellees' facilities own their own automobiles and the remaining employees ride with them when there is a need or occasion for transportation (Tr. 58-59), that all of the communities involved are connected by paved two-lane highways open all year (Tr. 58-63), that on several occasions similar facilities, under similar circumstances, at other mines have been destroyed or discontinued without affecting production, that at some mines no such facilities exist at all (Tr. 69-71), and that Appellees' facilities are not remote and isolated to the extent that they are removed from ordinary business competition (Tr. 69).

This is quite a different situation from Womack. To apply the principle of that case is to reject the

specific findings of the trial court. If accepted as we believe they must be, they clearly do not show activities closely related to or directly essential to the production of goods for commerce.

Furthermore, the test established by Congress in amending Section 3(j) requires that in order to be covered, the activity must be part of a closely related process and directly essential to the production of goods for commerce.

The Administrator himself has held that, in addition to a finding concerning the "directly essential" nature of the employees' activities, a finding must also be made that such activities are part of a "closely related process." There is a definite and clear distinction between the two.

> "The Amendments deleted the word 'necessary' and substituted the words 'closely related' and 'directly essential' contained in the present law. * * * Under the amended language, an employee is covered if the process or occupation in which he is employed in both 'closely related' and 'directly essential' to the production of goods for interstate or foreign commerce. (Emphasis added)
>
> * * *
>
> "Not all activities that are 'closely related' to production will be 'directly essential' to it, nor will all activities 'directly essential' to the production meet the 'closely related' test."
>
> 29 C. F. R. Ch. V, §776.17

It is clear from the Congressional history that the framers of the 1949 Amendments intended that for an employee to be covered he must be engaged in a process closely related to the production of goods for commerce. In debates in the House concerning the conference bill later enacted into law, Mr. McConnell, one of the House Managers, in reporting to the House on the conference bill stated as follows:

> "First - and this is important - the coverage of the act for a large number of employees is dependent upon the definition of 'production of goods for commerce'. A substantial change has been made in this definition which will have the effect of preventing the Administrator and the courts from extending the coverage to occupations which are not closely related and directly essential to production." (95 Cong. Rec. 14936.) (Emphasis added)

The foregoing effect of the amendment to Section 3(j) has been recognized by the Tenth Circuit Court of Appeals in Juarez v. Kennecott Copper Corp. (1955) 225 F. 2d 100 decided on July 26, 1955. In the Juarez case, the mining company itself owned and operated a hospital located at the rim of an open pit mine in New Mexico. It was contended by plaintiff that the work of the employees of the hospital was so closely related to the production of goods for commerce and so essential thereto as to place them within the coverage of the Act.

In finding that the work of the employees in the hospital was not closely related or directly essential to the production of goods for commerce, the Court stated:

> "Apparently no case involving employees of a company owned hospital has come before the courts. The cases nearest in point are those involving restaurant employees and cooks employed in feeding employees engaged in commerce or the production of goods for commerce. Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these cases arose prior to the amendment of Section 203(j) of the Act in 1949. By that amendment the word 'necessary' was dropped from the Act and the words 'in any closely related process' were added, making the section read 'or in any other manner working on such goods or in any closely related process or occupation directly essential to the production thereof, in any State.' We think it is clear from the legislative history that this amendment was to restrict coverage with respect to such employees. The conference report (H. R. Rep. No. 1453, 81st Cong. 1st Sess., Oct. 17, 1949, W.H.M. 6:607) states, "The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the Act has also been extended to employees of an individually owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403, 8 WH Cases 284 (N. D. Ohio) 1948).'
>
> "'Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases.'" (Emphasis by the Court)

Juarez v. Kennecott Copper Corp., 12 WH Cases 607, 609

The pronouncement of the United States Supreme Court in McLeod v. Threlkeld, (1943) 319 U. S. 491, 87 L.Ed. 1538, decided long after the Womack decision, we believe to be significant as applied to the facts in this case:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.
>
> McLeod v. Threlkeld, (1943) 319 U.S. 491, 497, 87 L. Ed. 1538, 1543-1544.

In that case the employees provided meals for maintenance-of-way employees of a railroad by means of a dining and kitchen car which was set at the place of work of the boarders wherever the right-of-way was being maintained. Because of the very nature of the work, the employees would have to utilize such facilities since on many if not most occasions no others would be available in the various desolate areas where this type of work had to be done.

For the foregoing reasons, we believe that the amendment to Section 3(j) of necessity affected the principle of the Womack case as applied to the instant

case. The activities involved here are not closely related and directly essential to the production of goods for commerce within the meaning of the words themselves or as Congress intended Section 3(j) to be applied.

II

THE RETAIL OR SERVICE EXEMPTION

A) The Proper Construction of Section 13(a)(2) of the Act Defining a Retail Establishment

The tests for determining what constitutes a retail or service establishment are entirely different from and independent of those determining whether an employee's activity is closely related or directly essential to the production of goods for commerce.

The test for determining whether the employees involved are covered by the Act is whether or not they were employed "on any closely related process or occupation directly essential to the production" of goods for commerce. In applying this test, factors such as remoteness, availability of other facilities and integration with the producer for commerce may be considered relevant.

But once it is decided that the employees are covered by the Act such factors are no longer material. It is then necessary to apply the tests specifically

enumerated in Section 13(a)(2) (29 U.S.C.A. 213(a)(2)) of the Act to determine whether or not the establishment employing such employees is a retail or service establishment as defined by that section. The activities of the employees are not controlling as in the case of the coverage question.

Section 13(a)(2) of the Act provides:

> "Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

This definition sets up three criteria which alone determine what constitutes a retail or service establishment:

1) Whether more than 50% of the establishment's annual dollar volume of sales of goods or services are made in California.

2) Whether 75% or more of the establishment's annual dollar volume of sales of goods or services, or both, are for resale.

3) Whether 75% or more of the establishment's

sales or services are recognized as retail sales or services in the particular industry.

The text of the House Manager's Statement reporting on the House-Senate conference bill which contained the 1949 amendments as enacted into law by signature of the President on October 26, 1949, is very relevant in explaining the requirements of Section 13(a)(2). The following are pertinent excerpts:

"Exemptions

"General statement. - The House bill substantially revised Section 13(a)(2) of the Act relating to retail and service establishments. . . .

* * *

"Retail and service establishments. - Both the House bill and the Senate amendment contained an identical amendment providing for an exemption for retail and service establishments (Sec. 13(a)(2)). The amendment was continued in the conference agreement.

"The amendment (Sec. 13(a)(2)) agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts, that no sale of goods or services for business use is retail. See Roland Electrical Co. v. Walling (326 U.S. 657); McComb v. Diebert (E.D. Pa. 1949), 16 Labor Cases, Par. 64,982; McComb v. Factory Stores (81 F. Supp 403 (N. D. Ohio, 1948)).

"Under paragraph (2) of Section 13(a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

"First, over 50 per cent of the establishment's sales by annual dollar volume of goods or services must be made within the state in which the establishment is located. The requirement that the greater part of the selling or servicing be in intrastate commerce, found in the present law, is eliminated because of the tendency of the courts to hold that many sales or services made or performed within a state are not intrastate sales or services. See Kirschbaum v. Walling (316 U. S. 517, 526); Boutell v. Walling (327 U. S. 463, 467). Under the new test, if the sales are made within the state in which the establishment is located, it is immaterial that the sales (a) are made pursuant to prior orders from customers, (b) contemplate the purchase of goods by the establishment from outside the state to fill customers' orders, or (c) are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce. In this connection, see Walling v. Jacksonville Paper Co. (317 U. S. 564).

"The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form. . . .

"The third test provides that 75 per cent of the establishment's annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service.

"The location of the establishment, whether in an industrial plant, an office, building, railroad depot, or a Government park, etc., will make no

"difference in the application of the exemption. So long as the establishment meets the tests described above, it will be excluded from the minimum wage and overtime provisions of the Act." (Emphasis added).

House Managers' Statement (House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949).

It will be noted again that the Factory Stores Co. decision which disposed of the retail exemption issue as did the Court in the instant case, namely upon the same considerations as determined the coverage question, was overruled in this respect.

When the Womack case was decided, the tests applicable to the coverage and to the retail exemption questions were both very general although quite different even then. The 1949 amendments, however, establish specific criteria for determining the retail exemption question. These criteria are unrelated to those relevant to the coverage question.

Furthermore, in determining whether the retail or service exemption applies it is the nature of the employer's business and not the character of the employee's activities which is controlling. Whether the employer's business constitutes a retail or service establishment is determined only by the application of the three tests specified in Section 13(a)(2).

To review the record on this issue:

The first two criteria set up by Section 13(a)(2) were established by stipulation and incorporated in the Findings of Fact as follows:

> "All of defendants' annual dollar gross income at their Darwin operation results from the furnishing of goods and services within the State of California.
>
> "All of the meals served, goods sold or lodging furnished by defendants at their Darwin operation are to persons who consume such meals or goods or utilize such services in the Anaconda area and within the State of California." (Tr. 29, 73.)

Indeed over 75% of the total annual dollar volume results from the dining and commissary operations alone (Tr. 64-65).

It was therefore only necessary to establish the third requirement, namely, that 75% or more of the annual dollar volume of sales of goods or services were recognized as retail sales or services in the particular industry. This was established by substantial, uncontradicted evidence, indeed the only evidence which was available, as follows:

a) Testimony and documents establish that the United States Bureau of Census in its 1948 Census of Business and its proposed 1953 Census of Business placed Appellees' type of activity in the category of a retail

trade (Tr. 152-153; Def.-App. Ex. F.).

b) Testimony and documents were introduced to show that the United States Office of Price Administration during the period of its existence, included Appellees' type of establishment in its survey and compilation of statistics concerning the restaurant industry (Tr. 153-154; Def.-App. Ex. G).

c) The testimony of the Secretary and General Counsel of the National Restaurant Association who testified, among other things, that Appellees were members of that Association; that the term 'retail sale or service' has a recognized meaning in the restaurant industry; that such term is defined as the sale or service of a meal to the consumer generally consumed on the premises of the establishment; that Appellees' sales and services are included within this definition and are recognized and known as retail sales and services in and by the restaurant industry; that the type of establishment operated by Appellees was part of the restaurant industry and participates in the activities of the Association in the same manner as its other types of operations; that Appellees' and similar operations are treated as part of the restaurant industry for the purposes of publications, conventions and other activities. Various documents were

introduced as further proof of the foregoing (Tr. 148-154; Def.-App. Exs. A to E, incl.).

That this is most relevant testimony is shown by the Congressional history of the 1949 amendments. Senator Holland, who was the sponsor in the Senate of the amendment to Section 13(a)(2), which was later enacted into law, said in debate on the amendment concerning the practice of a trade association:

> "Mr. Douglas: Its interpretation would be very persuasive, would it not, even if not controlling?
>
> "Mr. Holland: Yes, it would be quite persuasive." (95 Cong. Rec. p. 12501.)

d) It was stipulated that the Secretary of the Southern California Restaurant Association would testify substantially the same with respect to the Southern California area (Tr. 150, 160-161; Def.-App. Ex. H).

The evidence shows that the trade associations of which Appellees are a part both national and state, the United States Census Bureau, and the United States Office of Price Administration during its existence, all recognized that Appellees' sales and services are retail sales or services in the industry of which Appellees are a part.

Appellant did not introduce a single item of evidence to rebut this proof.

In order to show that the retail or service exemption applied, it was necessary for Appellee to show only the existence of three specified criteria. Two were established by stipulation and the third by substantial and uncontradicted evidence, a substantial part of which was documentary and which alone establishes such criterion.

The criteria to determine whether the exemption applies are specific. In this case each of the three requirements are fully established, two by stipulation and the third by stipulated and uncontradicted evidence. Even assuming coverage, therefore, Appellees are exempt as a retail establishment.

B) Whether the Case Should be Remanded to the District Court for Findings

We urged in our brief filed with this Court that in the event the Court should find coverage, it could then consider the application of Section 13(a)(2) upon the basis of the present record without the necessity for remanding the case to the District Court for findings on this question with the consequent time and expense to the parties involved (Brief for Appellees, p. 58-59).

We believe that the Court may determine this question on the basis of the present record for the

following reasons. *

First, two of the three criteria determinative of the retail exemption question are stipulated. The third is established by uncontradicted evidence, a substantial part of which is documentary (Appellees' Exhibits A-H inclusive). The foundation for each of these exhibits was stipulated (Tr. 149, 151). The documentary evidence considered alone establishes the third criterion.

Second, Judge Carter's decision was based in part upon the fact that Appellees' operation was a retail and service establishment under Section 13(a)(2), even though he made no specific findings on this issue because he felt they were unnecessary in view of his determination of the coverage question.

> "The Court: I would hold, also, that it is a retail establishment within the exemption. I would base my decision on both grounds." (Tr. 165)

There is no disputed issue of fact. The evidence is entirely stipulated or uncontradicted. It would be necessary to have findings only in the event

*In both the Answer and in the Pretrial Stipulation and Order the issues concerning the application of the exemptions under Sections 13(a)(2) and 13(a)(1) were raised. The parties proceeded to trial on the basis of all three issues (Tr. 30-31, 83, 148-161).

that a question of credibility should exist. Such a question does not exist because the third criterion was not only established by testimony, but also by documents, the foundation for which was stipulated. Furthermore, since Judge Carter based his decision in part on the retail and service exemption, there can be no question of credibility. He of necessity accepted the evidence as establishing the third criterion. We feel that this Court can as well determine the retail exemption issue upon the present record as if the Trial Court had made findings.

Under these circumstances we believe the principle to be well established that the appellate court may decide the issue.

> "We have carefully read and considered the entire record, and while we think it is always desirable, on a trial to a judge without a jury, that the facts should be found to aid us in understanding the basis of the decision, we are nevertheless of opinion that here the record considered as a whole does not present a genuine issue as to any material fact - in view of which it would be both a waste of time and a needless expense to send the case back to the District Court for special findings of fact."
>
> Burman, et al v. Lenkin Construction Co., et al (D. C. Cir. 1945) 149 F. 2d 827, 828

> "The trial court made no findings of fact nor conclusions of law, as required by Rule 52(a) of the Rules of Civil Procedure, upon the defenses of

"ouster and waiver. Since the facts relied upon to support these two defenses are in the record and undisputed we shall not remand the case for this reason alone but will in the exercise of our jurisdiction under such circumstances consider and determine them. See Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S.Ct. 577, 84 L. Ed. 774; Helfer v. Corona Products, 8 Cir., 127 F. 2d 612; Knapp v. Imperial Oil & Gas Products Co., 4 Cir., 130 F. 2d 1, 3; Hurwitz v. Hurwitz, 78 U. S. App. D.C. 66, 136 F. 2d 796; Brown v. Quinlan, Inc. 7 Cir., 138 F. 2d 228, 229; Bowles v. Russell Packing Co., 7 Cir., 140 F. 2d 354.

* * *

"The trial court made no findings of fact nor conclusions of law relating to the defense of a special agreement. Doubtless such a finding was deemed unnecessary in view of the finding of nonuse. Since the evidence upon this issue is not in conflict and the proper inferences to be drawn therefrom only are in dispute, we shall examine the questions presented."

Sbicca-Del Mac v. Milius Shoe Co. (Eighth Cir. 1944) 145 F. 2d 389, 400, 402

"The fact that the district judge made no findings and announced no conclusions upon this issue, does not require remand, since the record is complete. Muncie Gear Co. v. Outboard Marine Manufacturing Co., 315 U. S. 759, 766, 768, 62 S. Ct. 865, 86 L. Ed. 1171"

Hazeltine Research, Inc. v. General Motors Corporation (Sixth Cir. 1948) 170 F. 2d 6, 10. cert. den., 336 U.S. 938, 93 L. Ed. 1097

"The duty of the trial court to make findings of fact should be strictly followed. But such findings are not a jurisdictional requirement of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so

"clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here."

Hurwitz v. Hurwitz (D.C. Cir. 1943) 136 F. 2d 796, 799

See also:

Goodacre v. Panagopoulos (D. C. Cir. 1940) 110 F. 2d 716, 718

Life Savers Corp. v. Curtiss Candy Co. (Seventh Cir. 1950), 182 F. 2d 4, 7

Knapp v. Imperial Oil and Gas Products Co. (Fourth Cir. 1942), 130 F. 2d 1, 3

Woodruff v. Heiser (Tenth Cir. 1945) 150 F. 2d 873, 875

This Court has similarly applied this principle. See Flotation Systems v. U. S. (Ninth Cir. 1943) 136 F. 2d 483, 484.

Furthermore:

"The trial court made no findings of fact as required by Equity Rule 70-1/2 of Supreme Court, 28 U.S.C.A. following Section 723. In the absence of statute or rule compelling specific findings of fact, the decree in cases where no findings of fact were made has been regarded as impliedly a finding of all the facts sufficient to support the decree which could have been found from the pleadings and the proof."

Shellman v. Shellman, et al (D.C. Cir. 1938) 95 F. 2d, 108, 109

We believe therefore that the record is clear and complete on the exemption question, so much so that

findings would serve little purpose. There are no disputed issues of fact. All relevant facts are established either by stipulation or by uncontradicted evidence including documents the foundation of which is stipulated. Judge Carter based his decision in part upon a finding that Appellees' facility was a retail establishment, thereby necessarily finding from such evidence that the three criteria of Section 13(a)(2) were established.

DATED: January 13, 1956

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
WILLIAM FRENCH SMITH
JAMES J. RYAN,

By s/ William French Smith
William French Smith

Attorneys for Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

Lucille Kraemer, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 634 South Spring Street, Los Angeles, in said County and State; that on the 13th day of January, 1956, affiant served a copy of Supplemental Brief on appellant, James P. Mitchell, Secretary of Labor, United States Department of Labor, by placing a true copy thereof in an envelope addressed to the respective attorneys at the address of said attorneys as follows:

Stuart Rothman, Solicitor
Bessie Margolin, Chief of Appellate Litigation
William W. Watson, Attorney
Kenneth C. Robertson, Regional Attorney
United States Department of Labor
Washington 25, D. C.

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles, California; that there is regular

communication by mail between the place of mailing and the place so addressed.

s/ Lucille Kraemer
Lucille Kraemer

Subscribed and sworn to before me
this 13th day of January, 1956.

s/ Irene H. Jones
Notary Public in and for the County
of Los Angeles, State of California.

My Commission Expires Sept. 29, 1958.

(SEAL)